Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT R. KAUFMAN,

Petitioner,

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Is this action precluded by the Full Faith and Credit Act, 28 U.S.C. §1738, where petitioner is claiming that an administrative rule barring him from membership in a public employees' retirement system deprives him of equal protection and due process of law, but petitioner previously challenged the same administrative rule in New York's courts and a final determination was made upholding the rule?

2. Is a constitutional claim stated by petitioner's argument that an administrative rule excluding evening school instructors from pension eligibility is void because it impermissibly restricts the eligibility granted by statute, where the rule has been upheld by an intermediate appellate court in New York and, even if it is ultra vires, it is simply an erroneous interpretation of rights granted by local statute?

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RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

a. Federal Statute

28 U.S.C. §1738:

> The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or

> usage in the courts of such State . . . from which they are taken.

b. Local Statutes

New York City Administrative Code §13-104 (formerly §B3-3.0):

> [T]he membership of the retirement system shall consist of:
>
> 1. All persons in city-service, as defined in this title . . . .

New York City Administrative Code §13-101(3)(a) (formerly §B3-1.0[3][a]):

> "City-service" shall mean service, whether appointive or elective, as an officer or employee of the city or state of New York, of any agency thereof and of any court, so far as such service is paid for by the City. . . .

c. Administrative Regulations

Rules and Regulations of the New York City Board of Estimate for the Administration and Transaction of the Business of the New York City Employees' Retirement System (hereinafter "NYCERS Rules")

Rule 11(f):

> No person who is paid other than a regular per annum salary, who

> renders less than full time service . . . shall, by such service, acquire any right or benefit in the Retirement System.

Rule 11(h):

> No person who, after October 1, 1920, renders service as a Teacher, Director, Instructor or Life Guard in the evening or summer schools or vacation playgrounds shall, by such service, acquire any right or benefit in the Retirement System.

STATEMENT OF THE CASE

Petitioner, an evening school teacher, claims violation of his constitutional rights to equal protection and due process because a rule of respondent's bars evening school teachers from membership in the New York City Employees Retirement System (NYCERS), the pension system for most New York City employees. Petition for Certiorari at 4-6 (hereinafter "Petition").

Petitioner was first employed by the City of New York in 1966 as a caseworker in the Department of Social Services, and he

became a member of NYCERS. Complaint, pars. 3, 5 (reprinted in Petition at 50a-51a). Petitioner has also worked continuously since 1967 as an instructor in an evening school. Complaint, par. 4 (Pet. at 50a).

In 1974, petitioner was dismissed from his caseworker position for insubordination, a dismissal upheld by New York's courts. See Complaint, par. 6 (Pet. at 51a); Kaufman v. Dumpson, 45 A.D.2d 993, 359 N.Y.S.2d 996 (2d Dep't 1974), appeal dismissed, 35 N.Y.2d 993, 365 N.Y.S.2d 1029, appeal denied, 36 N.Y.2d 643, 368 N.Y.S.2d 1025 (1975).

Petitioner was informed that this dismissal rendered him ineligible for NYCERS membership (Pet. at 62a), and he sued in the New York courts for a judgment declaring that he was still in NYCERS. His petition, filed pro se, focused on his 1974 dismissal from his caseworker position.

The suit was dismissed at first, but the Appellate Division of New York State Supreme Court reversed that order, remanding the case because, although the pro se petition did not state a claim, the full record showed petitioner might be eligible for membership in NYCERS by virtue of his evening school employment. See Kaufman v. Department of Social Services, 99 A.D.2d 778, 472 N.Y.S.2d 31 (2d Dep't 1984).

After remand, the suit was again dismissed, and petitioner appealed. While this appeal was pending, petitioner filed another state court action seeking pension eligibility, but this second suit was dismissed as an improper attempt to relitigate the issues determined in the first pension suit. See Kaufman v. Department of Social Services, No. 29416/85 (N.Y. Sup. Ct. Kings County Nov. 16, 1986) (reprinted infra at A-1).

On the appeal in the first pension action, the Appellate Division upheld the dismissal of petitioner's action, finding that NYCERS Rule 11(h), barring evening school instructors from membership, was valid because it was "neither irrational nor unreasonable." See Kaufman v. Department of Social Services, 131 A.D.2d 576, 577, 516 N.Y.S.2d 291 (2d Dep't), appeal denied, 70 N.Y.2d 613, 524 N.Y.S.2d 432 (1987).

Subsequently, in an unrelated case, New York's Court of Appeals struck down the exclusion in NYCERS Rule 11(f) of part-time City employees from pension membership, holding that the rule does not conform to the governing statute (N.Y.C. Admin. Code §13-104), which makes all City employees eligible for NYCERS membership. See Doctors Council v. New York City Employees' Retirement System, 71 N.Y.2d

669, 675, 529 N.Y.S.2d 732 (1988) (hereinafter "Doctors Council").[1]

SUMMARY OF ARGUMENT

Federal courts must give the New York judgment dismissing petitioner's earlier challenge to NYCERS Rule 11(h) the same preclusive effect it would receive in New York's courts. In New York, petitioner could not assert the constitutional claims raised in this action because they arise from the same events that spawned petitioner's first pension action. Nor does the New York Court of Appeals' holding in Doctors Council, supra, 71 N.Y.2d 669 alter this result, even though that ruling calls into

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[1] As a result of this decision, evening school teachers are being treated as eligible for membership in a retirement system. No decision has been made on which of New York City's several retirement systems is appropriate for evening school teachers nor has the question of retroactive pension eligibility been resolved.

question the reasoning used by the Appellate Division when it dismissed petitioner's action. Under New York law, once a suit has been finally determined, a subsequent change in the interpretation of the law can not be used to undo the result.

Nor is there any merit to petitioner's constitutional claim. NYCERS enacted a rule that may have erroneously kept petitioner and other evening school teachers from becoming NYCERS members. The fact that the rule was upheld by an intermediate appellate court in New York shows that it was not an arbitrary and irrational usurpation of clear statutory rights. Accordingly, the rule's application to petitioner is not a deprivation of due process.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THIS ACTION IS PRECLUDED BY PETITIONER'S PRIOR STATE COURT ACTION LITIGATING HIS PENSION ELIGIBILITY.

The state-court judgment dismissing petitioner's action for pension eligibility based on his evening school employment precludes this suit seeking the same relief. In Migra v. Warren City School District Board of Education, 465 U.S. 75, 84-85 (1984), this Court held that, in actions pursuant to 42 U.S.C. §1983, federal courts must give a state-court judgment the same claim preclusive effect it would have in the courts of the State that issued the judgment. See also, University of Tennessee v. Elliott, 478 U.S. 788, 796 (1986).

The Second Circuit Court of Appeals correctly determined that this action would

be barred in a New York court. See Kaufman v. New York City Employees' Retirement System, No. 88-7691 (2d Cir. Feb. 3, 1989) (reprinted in Petition at 1a, 3a). In O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687 (1981), the New York Court of Appeals held that, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy." (citation omitted); accord, Reilly v. Reid, 45 N.Y.2d 24, 30, 407 N.Y.S.2d 645 (1978); see also, Wright v. National Bank of Stamford, 600 F. Supp. 1289, 1299 (N.D.N.Y.), aff'd w/out opn., 767 F.2d 909 (2d Cir. 1985) (applying New York rule).

Petitioner's New York action sought exactly what he is seeking here: a determination that his service as an evening

school teacher entitles him to NYCERS membership. The Appellate Division of New York's Supreme Court upheld the dismissal of petitioner's action, ruling that the same NYCERS rule being challenged here was lawful. See Kaufman, supra, 131 A.D.2d at 577. New York's highest court denied leave to appeal this order. 70 N.Y.2d 613, 524 N.Y.S.2d 432. Indeed, New York's courts have already dismissed a second state-court lawsuit on this subject as an improper attempt to relitigate petitioner's first state pension action. See, infra at A-1.

This action remains precluded even though the reasoning in the New York Court of Appeals' subsequent decision in Doctors Council, supra, 71 N.Y.2d 669, (invalidating a rule excluding part-time employees from NYCERS membership) calls into question the result reached in petitioner's first state-court pension suit. See supra at 7,

n.1. In Slater v. American Mineral Spirits Co., 33 N.Y.2d 443, 447-448, 354 N.Y.S.2d 620 (1974), New York's Court of Appeals ruled that, "[t]he conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law . . . . Indeed, to hold otherwise might be to raise constitutional issues." (citations omitted).

POINT II

IN ANY EVENT, PETITIONER'S CLAIM TO ELIGIBILITY FOR A PENSION DOES NOT IMPLICATE ANY RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION.

Assuming, arguendo, that this action is not precluded by petitioner's pension litigation in New York's courts, there is no merit to petitioner's constitutional claim. Petitioner asserts that NYCERS' rule barring evening school teachers from pension eligibility violates his rights to equal protection and due process because the rule

impermissibly impinges on pension rights granted by statute. See Petition at 4-6. However, even if the rule was invalid, its promulgation does not violate any federally-protected rights.

Petitioner has never articulated the basis for his constitutional claim. An exclusion of evening school teachers from pension membership does not violate equal protection rights. Absent discrimination for impermissible reasons, such as race, states and localities may certainly choose which categories of employees should receive retirement benefits and which should not.

Nor was petitioner denied procedural due process. As the history of this case indicates, petitioner had ample opportunity to use the state courts to litigate the validity of the rule excluding him from NYCERS membership.

Petitioner's claim seems to be one of denial of substantive due process. However, petitioner's pension rights, if any, flow solely from state and local law. The Constitution would not be violated if NYCERS interpreted petitioner's rights more narrowly than state and local statutes intended. Compare Dean Tarry Corp. v. Friedlander, 826 F.2d 210 (2d Cir. 1987) (no due process violation where deprivation resulted from an administrative regulation subsequently found to violate state law) with Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) (due process violation where official arbitrarily denied a clear legal entitlement). In Dean Tarry, 826 F.2d at 213, the Second Circuit Court of Appeals explained that the arbitrary action in Sullivan violated due process rights because the official acted "out of thin air" to deny a clear legal entitlement, while the administrative regulation in Dean

Tarry negated any reasonable expectation of entitlement, even though it was subsequently found invalid.

As the Court held in Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 831 (1st Cir.), cert. denied, 459 U.S. 989 (1982), where plaintiff claimed denial of due process based on a town's alleged violations of state law in denying approval of a development plan:

> were [petitioner's] theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error . . . could be brought in to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.

This reasoning is equally applicable here. Even if NYCERS' rules erroneously infringed on petitioner's pension rights, that did not

deprive petitioner of any rights secured by the U.S. Constitution.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

July 12, 1989

Respectfully submitted,

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SUPREME COURT OF THE STATE
OF NEW YORK
COUNTY OF KINGS
----------x

In the Matter of the
Application of
ROBERT R. KAUFMAN,

BY: J. SPODEK, J.

Petitioner,

Index No.
-against- 29416/85

NEW YORK CITY EMPLOYEES
RETIREMENT SYSTEM,

Respondent.
----------x

Petitioner seeks a judgment pursuant to the provisions of Article 78 of the C.P.L.R. directing respondent to process, implement and pay petitioner certain pension benefits. Respondent cross moves for summary judgment on the grounds of collateral estoppel.

Petitioner's contentions were originally raised before the Justice presiding at Special Term, Part I of this court, who dismissed

petitioner's application in a judgment dated December 14, 1981. Special Term's dismissal was reversed in an order of the Appellate Division, Second Department dated February 14, 1984, and the matter was remanded for further proceedings. It was then assigned for hearing and determination to a judicial hearing officer who dismissed the petition in a lengthy memorandum opinion dated December 20, 1985. Petitioner then served a notice of appeal on January 30, 1986.

Petitioner now seeks to relitigate the same issues which were determined in the opinion of the judicial hearing officer dated December 20, 1985. Said determination is

currently under appeal and petitioner is collaterally estopped from attacking the prior determination by instituting the instant proceeding. The only appropriate method of challenging the prior decision is by pursuing the appeal noticed on January 30, 1986.

Accordingly, respondent's cross motion to dismiss is granted pursuant to the provisions of Section 322(a)(5) [sic][1] of the C.P.L.R.

Settle judgment.

Dated: November 18, 1986

/s/
J.S.C.

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[1]The reference should be to N.Y. Civ. Prac. Law 3211(a)(5).